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No. 05-983

IN THE

Supreme Court of the United States

JACOB WINKELMAN, *et al.*,
Petitioners,

v.

PARMA CITY SCHOOL DISTRICT,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF AUTISM SOCIETY OF AMERICA, NORTHERN VIRGINIA CHAPTER, COALITION OF TEXANS WITH DISABILITIES, DISABILITY LAW & ADVOCACY CENTER OF TENNESSEE, KENTUCKY PROTECTION AND ADVOCACY, PARENTADVOCATES.ORG, PARENTS FOR AUTISTIC CHILDREN'S EDUCATION, AND JEFF AND SHARON PODOWITZ, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE* [1]

The Autism Society of America, Northern Virginia Chapter (ASA-NV) is a non-profit organization that provides support,

[1] Pursuant to S. Ct. R. 37.6, *amici* state that no counsel to a party authored this brief in whole or in part and that no person other than the *amici curiae* and their members made a financial contribution towards the preparation and submission of the brief. Letters reflecting the consent of the parties have been lodged with the Court.

in the areas of education, vocational training and recreation, to families of those with autism. ASA-NV aids families in the collection and dissemination of information to parents, professionals and the general public, and fosters and reinforces awareness and respect for the rights of parents as the primary case managers in the lives of an autistic family member.

The Coalition of Texans with Disabilities is a public interest organization, founded in 1978 by people with disabilities, that provides advocacy services to people of all disabilities and ages.

Disability Law & Advocacy Center of Tennessee (DLAC) is a federally funded and authorized Protection and Advocacy organization that has provided advocacy services to people with disabilities in Tennessee since 1978. DLAC advocates for the educational rights of students and their parents under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, *et seq.* (IDEA), through legal representation, training for individuals and groups and by providing support in individualized education program (IEP) development. DLAC also serves as a resource for private attorneys, government officials and school personnel.

Kentucky Protection and Advocacy (KPA) is an independent state agency that is the federally mandated Protection and Advocacy organization in Kentucky. KPA provides advocacy services to promote and protect the rights of individuals with disabilities, including the rights of parents and children to receive a free appropriate public education (FAPE) under the IDEA.

Parentadvocates.org is the d/b/a of the E-Accountability Foundation, a Section 501(c)(3) non-profit organization dedicated to informing parents and children of their legal rights and assisting in the processes required to obtain an appropriate educational program for every child.

Parents for Autistic Children's Education (PACE) is a not-for-profit membership organization that serves parents and guardians of children with autism or similar disorders in the Northern Virginia area. PACE advocates on behalf of children with autism and their families for high-quality, effective and scientifically based educational programs and to ensure school-system compliance with the IDEA.

Jeff and Sharon Podowitz (individually and on behalf of their minor son, Derek Podowitz) seek, for themselves and their minor son, the right to participate in special education adjudications and litigation without counsel.

The Court's decision in this case will have profound effects on whether children receive a free and *appropriate* public education under the IDEA. *Amici* regularly represent and/or advocate for the interests of children and parents in the ongoing pursuit of a FAPE. *Amici* have a significant interest in participating in this debate and wish to offer their unique perspective on the reasons why the Court should grant the petition.

REASONS FOR GRANTING THE PETITION

The IDEA was designed to ensure that all children with disabilities have access to a FAPE and to protect the rights of children *and* parents. 20 U.S.C. § 1400(d)(1)(B). The Sixth Circuit's ruling in this case, however, has written into the IDEA a condition precedent for bringing an action to ensure that children receive a FAPE that Congress did not intend. Specifically, in dismissing petitioners' case, the Sixth Circuit rejected the notion that the Winkelmans, as parents of a disabled child, had their own rights under the IDEA. *Winkelman v. Parma City Sch. Dist.*, 150 Fed. App'x. 406 (6th Cir. 2005). Instead, the Sixth Circuit has required parents of a disabled child to hire an attorney to assert the rights guaranteed by the IDEA in federal court.

The Sixth Circuit's ruling conflicts with the decisions of other courts of appeals that have addressed the issue. The First Circuit permits parents to raise both substantive and procedural rights under the IDEA in federal court *pro se*. *See Maroni v. Pemi-Baker Reg'l. Sch. Dist.*, 346 F.3d 247 (1st Cir. 2003). Four other circuits have held that parents have procedural rights under the IDEA that they may assert in federal court *pro se*. This Court should grant the petition to resolve the conflict among the circuits in favor of the First Circuit's ruling by holding that parents, as "parties aggrieved" under the IDEA, have a right to assert both procedural and substantive IDEA claims *pro se* in federal court.

I. THE QUESTION PRESENTED IS OF GREAT SIGNIFICANCE TO CHILDREN WITH DISABILITIES, THEIR PARENTS AND SOCIETY AS A WHOLE.

A. Education Occupies a Position of Fundamental Importance in Our Society.

More than fifty years ago, in *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), this Court declared the fundamental importance of education:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education * * * demonstrate our recognition of the importance of education to our democratic society. * * * In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

Id. at 493. The Court since has confirmed the vital role that education plays in maintaining the foundations of our democratic society. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972) ("[A]s * * * pointed out early in our history, * * * some degree of education is necessary to prepare

citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence."); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring) (recognizing "the public schools as a most vital civic institution for the preservation of a democratic system of government"). When an individual is deprived of an appropriate education, that deprivation works an "inestimable toll" on the "social[,] economic, intellectual, and psychological well-being of the individual," and poses an "obstacle * * * to individual achievement" that "make[s] it most difficult to reconcile the cost or the principle of a status-based denial of basic education with the framework of equality embodied in the Equal Protection Clause." *Plyler v. Doe*, 457 U.S. 202, 222 (1982).

Moreover, in today's society, educational attainment plays a critical role in defining an individual's economic opportunities. For example, recent statistics illustrate that individuals who fail to complete high school face unemployment rates of 40%, *see* National Center for Education Statistics (reporting 2004 data), *available at* http://nces.ed.gov/programs/digest/d04/tables/ dt04_381.asp (last visited March 22, 2006), and earn approximately 25% less than high school graduates. *See* National Center for Education Statistics (reporting 2002 data), *available at* http://nces.ed.gov/programs/coe/2004/section2/ table.asp?tableID=54 (last visited March 22, 2006). Therefore, the failure to provide an appropriate education will further marginalize students with disabilities and will decrease the likelihood that they will have economically and socially productive lives.

B. Prohibiting Parents from Proceeding *Pro Se* to Assert Rights Under the IDEA Has a Detrimental Impact on Children with Disabilities.

1. *Children with Disabilities Are Dependent Upon Their Parents to Ensure that They Receive an Appropriate Education Under the IDEA.*

As this Court has recognized, "it is the natural duty of the parent to give his children education suitable to their station in life." *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923); *see also Collinsgru v. Palmyra Bd. of Educ.*, 161 F.3d 225, 237 (3d Cir. 1998) (Roth, J., dissenting) (noting "the special nature of the relationship between parents and their children and * * * the role of parents in directing their children's education rights and opportunities"). For children with disabilities, the parental role is even more vital. Indeed, as Congress recognized, parental participation under the IDEA is critical to the development of an appropriate educational program for a child with a disability.

In drafting the IDEA, "Congress sought to protect individual children by providing for parental involvement in the development of state plans and policies, and in the formulation of the child's individual educational plan." *Bd. of Educ. v. Rowley*, 458 U.S. 176, 208 (1982) (citation omitted).[2] For example, the IDEA provides for extensive parental involvement in the development and revision of a

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[2] In *Rowley*, this Court construed the Education for All Handicapped Children Act (EHA), the predecessor to the IDEA. *See, e.g.*, S. Rep. No. 107-11, at 22; H.R. Rep. 106-1040, at 66; *see also* H.R. Rep. 105-95, at 81 ("The EHA amendments of 1990, Public Law 101-476, renamed the statute as the Individuals with Disabilities Act"). This Court and other federal courts routinely rely interchangeably on cases that cite the IDEA and cases that cite the EHA. *See Schaffer v. Weast*, 126 S. Ct. 528, 531 (2005); *Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 764 (6th Cir. 2001); *Diatta v. District of Columbia*, 319 F. Supp. 2d 57, 62 (D.D.C. 2004).

child's IEP, authorizes parents to request due process hearings, allows parents to appeal adverse decisions to the state education agency and makes parents responsible for exhausting administrative remedies. 20 U.S.C. §§ 1415(b)(1), (f)(1), (g), (l). Children with disabilities thus are dependent upon their parents to ensure that they receive their right to a FAPE under the IDEA.

2. *Many Parents Have no Choice but to Proceed* Pro Se *in Order to Enforce the Rights Granted by the IDEA.*

Many parents of children with disabilities have no choice but to proceed *pro se* because obtaining legal representation is either too expensive or entirely unavailable. "Most attorneys will be reluctant to take on cases * * * characterized * * * by voluminous administrative records, long administrative hearings, and specialized legal issues, without a significant retainer." *Collinsgru*, 161 F.3d at 236.

Indeed, because a greater percentage of disabled children, as compared to the percentage of the general population, live below the poverty line, payment of a significant retainer is not an option available to many parents of children with disabilities. Mary Wagner, *et al.*, *The Children We Serve: The Demographic Characteristics of Elementary and Middle School Students With Disabilities And Their Households* at 28 (September 2002), *available at* http://www.seels.net/design docs/ SEELS_Children_We_Serve_Report.pdf (last visited March 22, 2006); National Dissemination Center for Children with Disabilities, *Who Are the Children in Special Education?* at 6 (July 2003), *available at* http://www.nichcy.org/ pubs/research/rb2.pdf (last visited March 22, 2006). Specifically, almost one quarter of children with disabilities are living in poverty, compared with 16 percent of children in the general population. *See id.* As a result, many parents of children with disabilities simply are unable to afford counsel. *See* Mary Wagner, *et al.*, *The Individual and Household*

Characteristics of Youth With Disabilities: A Report from the National Longitudinal Transition Study-2 (NLTS2) at 3-4 (August 2003), *available at* http://www.nlts2.org/dfs/w1c1_exec_sum-standalone.pdf (last visited March 22, 2006) (noting that parents of children with disabilities are 17 percent more likely to be unemployed); *see also* 150 Cong. Rec. S5250-02, S5351 (daily ed. May 12, 2004) (statement of Sen. Kennedy) ("Most parents don't have access to an attorney, or must rely on low-cost legal aid. And data from surveys shows that even this help is in short supply.").

Although advocacy organizations exist to provide legal assistance, they have extremely limited resources:

- The Arizona Center for Disability Law received (between 2000 and 2003) over 4800 requests and offered assistance to about 300 families. "[T]here is one private attorney in the State of Arizona who routinely accepts referrals in this area of the law."
- The Disability Law Project in Vermont notes that "there are four private practice attorneys who have accepted special education referrals with some regularity."
- The Michigan Protection and Advocacy Service received (between October 1999 and April 2003) 6,015 requests and provided representation in 14 percent of those requests. As of 2003, its referral list of private attorneys contained only 8 attorneys, none of whom was located in 80 of the 83 Michigan counties and none of whom was located in the 10 most populous cities in Michigan (based on the 1990 census figures).
- The Wisconsin Coalition for Advocacy can staff, on average, 25 percent of such cases; of the remaining 75 percent, less than 10 percent can find and afford attorney representation. "[T]here are fewer than 10 private attorneys in Wisconsin who will represent families in special education matters."

- The Disability Law Center in Boston, Massachusetts receives between 200 and 500 requests annually; "we were at best able to provide help to less than 10% of the families requesting help."
- The Disability Law Center of Alaska received (between 2000 and 2003) over 1,092 intakes, but opened only 183 cases.
- Kentucky Protection and Advocacy received (between 2000 and 2003) 2,739 requests and opened cases for 233 persons, declining the remaining 2,487 persons.

Maroni v. Pemi-Baker Reg'l. Sch. Dist., No. 03-1407 (consolidated with No. 03-1700), Brief of *Amici Curiae*, The Disabilities Rights Center, Inc., and The National Association of Protection and Advocacy Systems, Exs. 1, 4, 7, 8, 9, 10, 11 (1st Cir. July 2003).

3. *If Permitted to Stand, the Sixth Circuit's Decision Will Render Illusory Most of the Rights Provided by the IDEA.*

The Sixth Circuit's ruling, which prohibits parents from enforcing the rights afforded by the IDEA *pro se*, will have a detrimental impact on the very people sought to be protected under the IDEA—disabled children. As this Court has recognized, Congress passed the IDEA as "an ambitious federal effort to promote the education of handicapped children [due to] Congress' perception that a majority of handicapped children * * * were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to drop out." *Rowley*, 458 U.S. at 179 (second brackets in original) (internal quotations omitted).[3] Indeed, Congress has made clear its belief that providing an appropriate education to children with

[3] *See* 20 U.S.C. § 1400(c)(2)(A), (B) (noting Congress' recognition that millions of children with disabilities were either excluded from or otherwise denied an appropriate public education).

disabilities would best serve society's interest. 20 U.S.C. § 1400(c) (setting forth Congress' findings in enacting IDEA); *Rowley*, 458 U.S. at 201 n.23 ("providing appropriate educational services now means that many of these individuals will be able to become a contributing part of our society, and they will not have to depend on subsistence payments from public funds") (quoting 121 Cong. Rec. 19492 (1975) (remarks of Sen. Williams)); *see also* 20 U.S.C. § 1400(c)(1) ("Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.").

Prohibiting parents from asserting IDEA claims *pro se* will result in the denial to many students of the right to receive an appropriate education solely because their parents are unable to afford or otherwise obtain legal counsel. "[W]here parents could not obtain representation or chose not to pay for counsel, many children with special needs would be precluded from exercising their statutory right to judicial review of their administrative due process hearings." *Maroni*, 346 F.3d at 257 (footnote omitted). Denying a parent's right to bring such an action would result in many children having no recourse when they have been unfairly denied a FAPE – a result that is contrary to the stated purpose of the IDEA. *See* M. Brendhan Flynn, Note, *In Defense of Maroni: Why Parents Should be Allowed to Proceed Pro Se in IDEA Cases*, 80 Ind. L.J. 881, 887-88 (2005) ("The importance of having a vigorous system of judicial review is apparent since states are lax in enforcing school compliance with the IDEA, some schools traditionally override parents' concerns about their child's IEP, and because due process hearings are skewed against poor children.") (citations omitted).

To put the issue into perspective, the Court's resolution of this issue will affect approximately 6.6 million disabled children that qualify for federally supported services under

the IDEA and related programs. This figure represents approximately 14 percent of all students enrolled in public schools, pre-kindergarten through the twelfth grade. *See* National Center for Education Statistics (reporting for 2003-04 school year), *available at* http://nces.ed.gov/programs/digest/d04/tables/ dt04_052.asp (last visited March 22, 2006).

II. THERE IS A CONFLICT AMONG THE CIRCUITS CONCERNING WHETHER PARENTS CAN PROCEED *PRO SE* TO ASSERT RIGHTS UNDER THE IDEA.

There is a significant three-way conflict among the courts of appeals concerning whether parents have the right to pursue IDEA claims *pro se* in federal court: one circuit has recognized parents' rights to bring both *procedural* and *substantive* claims *pro se* in federal court; four circuits have allowed parents to pursue claims for *procedural* violations only; and one circuit (the Sixth Circuit in this case) has completely barred parents from bringing IDEA claims *pro se*.

The First Circuit has recognized that parents may prosecute an IDEA case *pro se* "regardless of whether the rights asserted are *procedural* or *substantive*" because "[parents] are 'parties aggrieved' within the meaning of § 1415(i)(2)(A) of the IDEA." *Maroni*, 346 F.3d at 250. In reaching this conclusion, the First Circuit stated that the "parties aggrieved" provision in the IDEA does not draw any distinction between *procedural* and *substantive* rights. *Id.* at 253. The First Circuit added that courts drawing a distinction between procedural and substantive rights have created a distinction that Congress did not intend to include in the statute. *See id.* at 254 (noting that "none of the provisions of IDEA regarding the right of parents to seek relief in administrative or judicial hearings draws a distinction between substantive and procedural rights").

All but one of the other courts of appeals that have ruled on this issue (the Sixth Circuit in this case) have held that non-attorney parents are allowed to pursue claims asserting *procedural*, but not *substantive*, violations of the IDEA *pro se*. *See, e.g., Wenger v. Canastota Cent. Sch. Dist.*, 146 F.3d 123, 124, 126 (2d Cir. 1998) (holding that "in federal court a non-attorney parent must be represented by counsel in bringing an action on behalf of his or her child" but a parent "is, of course, entitled to represent himself on his claims that his *own* rights as a parent under the IDEA were violated by the [school district's] failure to follow appropriate procedures") (internal quotations omitted); *Collinsgru*, 161 F.3d at 231, 233 (holding that "the right to proceed *pro se* in federal court does not give non-lawyer parents the right to represent their children in proceedings before a federal court," but the IDEA "clearly grants parents specific procedural rights, which they may enforce in administrative proceedings, as well as in federal court"); *Navin v. Park Ridge Sch. Dist. 64*, 270 F.3d 1147, 1149 (7th Cir. 2001) (per curiam) (holding that a parent "was free to represent himself, but as a non-lawyer he has no authority to appear as [his child's] legal representative"); *Devine v. Indian River County Sch. Bd.*, 121 F.3d 576, 581-82 (11th Cir. 1997) (holding that parents who are not attorneys may not bring a *pro se* action on their child's behalf, but noting that a parent who is also a plaintiff may, in appropriate circumstances, be permitted to prosecute his own case without counsel).

Although these courts stopped short of permitting parents to raise substantive violations *pro se*, they acknowledged that the resolution of this issue was far from clear. *See, e.g., Collinsgru*, 161 F.3d at 235 ("[T]he language of the IDEA is unclear on its face. Some of its language can be read to suggest that Congress intended parents and children to share the underlying substantive right—that is, that Congress meant both to give children a substantive right to an appropriate

education and to give their parents the substantive right to have their children receive an appropriate education.").

Only the Sixth Circuit has taken the dramatically different approach of imposing a complete bar to *pro se* prosecution of IDEA claims in federal court. According to the Sixth Circuit's reasoning, a parent may not prosecute an IDEA case *pro se* because "any right on which [a parent] could proceed on their own behalf would be derivative of their [child's] right to receive a FAPE, and wholly dependent upon [the parents] proceeding, through counsel, with their appeal on [their child's] behalf." *Cavanaugh ex rel. Cavanaugh v. Cardinal Local Sch. Dist.*, 409 F.3d 753, 757 (6th Cir. 2005). For the reasons discussed in Part III below, this ruling is incorrect.

Given the lack of uniformity in the treatment of this issue, *amici* respectfully submit that the Court should grant the petition in order to resolve the question of what rights parents have under the IDEA and whether they can assert those rights in federal court *pro se*.

III. THE FIRST CIRCUIT'S RULING—THAT PARENTS HAVE BOTH SUBSTANTIVE AND PROCEDURAL RIGHTS UNDER THE IDEA THAT THEY MAY ENFORCE *PRO* SE—IS THE CORRECT ONE.

The right to sue provision in the IDEA states that "[*a*]*ny party* aggrieved by the findings and decision [made in a due process hearing] shall have the right to bring a civil action * * * in a district court of the United States without regard to the amount in controversy." 20 U.S.C. § 1415(i)(2)(A) (emphasis added). 28 U.S.C. § 1654 grants parties pursuing their own cause of action the right to proceed *pro se* in federal court. Therefore, according to the plain language of the statute, if parents are "parties aggrieved" within the meaning of § 1415(i)(2)(A), they have the right to proceed *pro se* in the federal courts.

The resolution of whether parents are "parties aggrieved" thus turns on whether parents have been granted their own rights under the IDEA. The First Circuit analyzed this issue correctly, concluding that parents have both procedural *and* substantive rights that can be asserted in federal courts *pro se*. *See Maroni*, 346 F.3d at 250 (holding that parents are "parties aggrieved" within § 1415(i)(2)(A) of the IDEA and have a right to proceed *pro se* regardless of whether the rights asserted are procedural or substantive). For the reasons set forth below, this decision is correct.

A. The Substantive Rights Established under the IDEA Belong to the Parent and Child Jointly and are Inextricably Intertwined with the Procedural Rights that the IDEA Affords to Parents.

The IDEA provides for substantive rights that are held jointly by children and parents (*i.e.*, students are entitled to receive appropriate educational services and parents are entitled to have their children receive those services at no cost). *See* 20 U.S.C. §1400(d)(1)(B) (noting that the main purpose of the IDEA is to "ensure that the rights of children with disabilities and *parents* of such children are protected") (emphasis added). This is a result of the special relationship between parents and their children and of the unique role parents play in directing their children's educational rights and opportunities. *Weber v. Cranston Sch. Comm.*, 212 F.3d 41, 51 (1st Cir. 2000) (noting "the central role played by parents in assuring that their disabled child receives a free appropriate public education") (internal quotations omitted); *see also Collinsgru*, 161 F.3d at 237 (Roth, J., dissenting) (the rights under the IDEA "are the rights of both the parents and the children, and they are overlapping and inseparable. In enforcing their own rights under the Act, parents are also acting on behalf of their child.").

The text of the IDEA clearly provides that the right to a FAPE includes both the right of children to receive an appropriate education and the right of parents to have their children appropriately educated at no cost. *See* 20 U.S.C. § 1400(c)(3) (providing that "[s]ince the enactment and implementation of the Education for All Handicapped Children Act of 1975, this chapter has been successful in ensuring children with disabilities *and the families of such children* access to a free appropriate public education") (emphasis added); *see also* S. Rep. No. 94-168, at 6, 8, 10-11, 32, 41-42 (1975), as reprinted in 1975 USCCAN 1425, 1430, 1432, 1434-35, 1456, 1464-65 (1975) (noting that "[p]arents of [handicapped] children have the right to expect that individually designed instruction to meet their children's specific needs is available" and that the instruction would be provided at "no cost to the parents of a handicapped child"). The statutory definition of a FAPE in the IDEA emphasizes the requirement that services be provided at no cost to the parent. *Id.* § 1401(9) (noting that a FAPE includes "special education and related services" that "have been provided at *public expense*, under public supervision and direction, and *without charge*") (emphasis added).

The origins and underpinnings of the IDEA support this conclusion: The EHA/IDEA was developed in response to litigation regarding children with disabilities who were excluded from mainstream public schools and denied appropriate public educational services. *Heldman on Behalf of T.H. v. Sobol*, 962 F.2d 148, 154 (2d Cir. 1992) ("The legislative history of the [EHA] points to a pair of federal court cases involving challenges to the exclusion of disabled children from the public schools.") (discussing *Pennsylvania Ass'n for Retarded Children v. Pennsylvania* (*PARC*), 343 F. Supp 279 (E.D. Pa. 1972); *Mills v. Bd. of Educ.*, 348 F. Supp. 866 (D.D.C. 1972)); *see also S. Rep. 94-168*, at 8-9 (1975), as reprinted in 1975 USCCAN 1425, 1432-33. Courts soon recognized that a school district's denial of services resulted

in parents either becoming obligated to pay for the educational services themselves or being forced to see their children forego any educational services at all. *See, e.g., PARC*, 343 F. Supp. at 283-86, 288; *Mills*, 348 F. Supp. at 869-70. Thus, early court decisions such as *PARC* and *Mills* ordered states to provide "free" public educational services to children with disabilities, relieving parents of the obligation to pay for these services and providing children with disabilities access to educational services at the public's expense, just like their non-disabled peers. *PARC*, 343 F. Supp. at 281-82, 302; *Mills*, 348 F. Supp at 878. That is, the courts held that imposing an obligation on parents to send their children to school created the parents' rights to have their children receive appropriate educational services at no cost.

In an effort to address the issues exposed in *PARC* and *Mills* at a national level, Congress passed the EHA, the predecessor to the IDEA.[4] 20 U.S.C. § 1400 (1990). In the EHA, Congress provided parents with a federal *substantive* right by requiring that students with disabilities be afforded the right to receive appropriate educational services free of charge, thus relieving parents of any obligation to pay for their child's educational needs. *Id.* § 1400(c); *S. Rep. No. 94-168*, at 6, 8, 10-11, 41-42 (1975), as reprinted in 1975 USCCAN at 1430, 1432, 1434-35, 1464. The substantive right to a free and appropriate education, at no cost to the

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[4] Parents were permitted to assert their rights *pro se* under the EHA. *Maroni*, 346 F.3d at 250 (citing 20 U.S.C. § 1415(e)(2) (1994) (superseded 1997)). The EHA contained language similar to that of the IDEA—that only a "party aggrieved" can bring suit. *Compare* 20 U.S.C. § 1415(e)(2) (1994) (superseded 1997), *with* 20 U.S.C. § 1415(i)(2)(A); *see also* Justin M. Bathon, *Defining "Parties Aggrieved" Under the Individuals with Disabilities Education Act: Should Parents be Allowed to Represent their Disabled Child Without an Attorney?* 29 S. Ill. U.L.J. 507, 509 (2005) ("The language in the original [EHA] is identical to that of the present IDEA.") (citations omitted).

parent, remains in the IDEA today. 20 U.S.C. §§ 1400(d), 1401(9). It is a right shared jointly by the child and parent.

Moreover, the parents' substantive rights and procedural rights under the IDEA are "inextricably intertwined." *Maroni*, 346 F.3d at 255. Indeed, federal courts have recognized the essential interrelationship between the IDEA's procedural and substantive rights. *See, e.g., Heldman*, 962 F.2d at 155 ("IDEA's procedural guarantees * * * serve not only to guarantee the substantive rights accorded by the Act; the procedural rights, in and of themselves, form the substance of IDEA.").

This conclusion is consistent with the fact that Congress did not define a FAPE in the IDEA. *See* 20 U.S.C. § 1401(9) (requiring only that services be provided free of cost, include an appropriate preschool, elementary, and secondary education, meet state standards and comply with the individualized educational program). In drafting the IDEA, Congress chose instead to impose on parents the responsibility for enforcing a wide range of procedural protections designed to ensure that each child would receive an appropriate education formulated specifically for him or her. For example, in § 1415(a), the IDEA requires state educational agencies to "'establish and maintain procedures * * * to ensure that children with disabilities and their *parents* are guaranteed procedural safeguards with respect to the provision of [a FAPE].'" *Maroni*, 346 F.3d at 256 (alteration in original) (citation omitted). Moreover, the IDEA provides procedural protections to *parents*, not the child, in regard to the identification, evaluation and educational placement of the child.

Thus, the procedural rights provided for by Congress necessarily are intertwined with the substantive rights under the IDEA. Indeed, the substantive rights that Congress intended to provide would be meaningless without the procedural rights provided for by the IDEA. *See Maroni*, 346 F.3d at 255-56 ("IDEA's procedural protections are designed

to encourage parental involvement in the ultimate goal of having the child receive a free appropriate public education."); *see also Rowley*, 458 U.S. at 205-06 ("It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process * * * , as it did upon the measurement of the resulting IEP against a substantive standard.") (internal quotations omitted).

B. The Sixth Circuit's Ruling is Inconsistent with and, Indeed, Thwarts Congress' Intent in Enacting the IDEA.

The Sixth Circuit's denial of a parent's right to prosecute IDEA claims *pro se* overlooks a fundamental rule of statutory construction—a statute must be construed in a way that avoids absurd results. *See, e.g., Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982); *Haggar v. Helvering*, 308 U.S. 389, 394 (1940); *United States v. Ryan*, 284 U.S. 167, 175 (1931).

As set forth above, the Sixth Circuit's ruling has no basis in the text of the IDEA, which does not require attorney representation to effectuate any of the enforcement mechanisms contained in the IDEA. The ruling is also inconsistent with Congress' intent in enacting the statute. For example, after finding that an attorney's presence could manifest an adversarial relationship between parents and a school district, Congress actually discouraged parents from obtaining counsel at the IEP level. *See Maroni*, 346 F.3d at 256; *see also* 34 C.F.R. Pt. 300, App. A., question 29 (2005). Additionally, once a dispute rises to the level of a due process hearing, the IDEA permits parents to have counsel accompany and advise

them, but does not require them to do so. *See* 20 U.S.C. § 1415(h)(1).[5]

There is an incongruity in a statutory reading that encourages parents to pursue the IEP process without an attorney and permits them to proceed at the due process hearing without representation, but then prohibits them from raising the same rights in the federal courts unless represented by an attorney. *Maroni*, 346 F.3d at 256-57 ("It would be odd for Congress to exclude parents from the definition of 'parties aggrieved' as to substantive claims, and thus force them to find attorney representation at the federal court level, after giving parents such a strong role at every other stage of the process."). It is simply illogical to suggest that Congress made it optional to have counsel at the IEP and due process levels, but then intended to require legal representation at the federal court level.

It is even more illogical to read the statute in a way that effectively renders meaningless an option that Congress wrote into the IDEA—the right to bring suit in state *or* federal court. *See* 20 U.S.C. § 1415(i)(2)(A). Indeed, a construction of 20 U.S.C. § 1415 which fails to recognize parents as parties in interest and, thus, precludes them from proceeding in federal court *pro se*, would create an unintended tactical advantage for school districts: a parent's right to litigate an IDEA action would be frustrated completely by a school district that is able to get the case into federal court. *See Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691

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[5] Most parents who request an impartial due process hearing are unrepresented by counsel. For example, in Illinois, in about one-half of the due process hearings between 1998 and 2002, the school district was represented by counsel but the parents had no such representation. Melanie Archer, Ph.D., *Access and Equity in the Due Process System: Attorney Representation and Hearing Outcomes in Illinois, 1997-2002* (December 2002), *available at* http://www.dueprocessillinois.org/AccessDP.htm (last visited March 22, 2006).

(2003). For example, where the parents filed the case in state court, but could not afford to hire a lawyer or otherwise obtain one, a judgment in favor of the school district would be a foregone conclusion if the school district removed the case to federal court, where the parents would not be allowed to proceed *pro se*. Moreover, in cases where *pro se* parents prevailed at the administrative hearing level, school districts could secure reversals simply by filing an appeal in federal court because, without an attorney, a family would be prohibited from appearing to defend the administrative result. Surely, Congress did not intend such absurd results.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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